

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	WT Docket No. 97-81
Regarding Multiple Address Systems	)	

**FURTHER NOTICE OF PROPOSED RULE MAKING AND ORDER**

**Adopted: May 18, 1999**

**Released: July 1, 1999**

**Comment Date: 60 days after Federal Register publication**

**Reply Comment Date: 90 days after Federal Register publication**

By the Commission:

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## APPENDIX A: Initial Regulatory Flexibility Analysis

## I. INTRODUCTION

1. In this *Further Notice of Proposed Rule Making and Order* ("*Further Notice*"), we address the impact of the Balanced Budget Act of 1997<sup>1</sup> on the Commission's ongoing Multiple Address Systems ("MAS") rule making proceeding.<sup>2</sup> Our objective is to supplement the record received in response to the *Notice of Proposed Rule Making* in this docket.<sup>3</sup> We believe that the ultimate resolution of the issues in this ongoing proceeding will benefit from further discussion in light of the revisions to the Communications Act of 1934, as amended, ("Communications Act")<sup>4</sup> by the Balanced Budget Act.<sup>5</sup> We seek comment, therefore, on the effect of the new statutory language in Section 309(j) of the Communications Act<sup>6</sup> on the proposals set forth in the *Notice*.

## II. EXECUTIVE SUMMARY

2. This *Further Notice* is intended to refine certain of the Commission's outstanding proposals in this proceeding. These refinements are intended to comport with statutory requirements established as a result of the Balanced Budget Act subsequent to the adoption of the *Notice*. Our goal in this proceeding continues to be to facilitate the further development and implementation of MAS. The following is a synopsis of our major proposals and actions taken herein. This *Further Notice*:

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<sup>1</sup> Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997) ("Balanced Budget Act").

<sup>2</sup> MAS is a point-to-multipoint, multipoint-to-point, radio communications service licensed under Parts 22 and 101 of the Commission's Rules, 47 C.F.R. Parts 22 and 101. Part 22 refers to the MAS service as point-to-multipoint. See 47 C.F.R. § 22.621. As specifically described *infra*, 3.2 megahertz of spectrum in the middle of the 900 MHz band is allocated for MAS use.

<sup>3</sup> Amendment of the Commission's Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Notice of Proposed Rule Making*, 12 FCC Rcd 7973 (1997) ("*Notice*").

<sup>4</sup> Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 *et seq.*).

<sup>5</sup> We have initiated a proceeding to assess the impact of the Balanced Budget Act on the Commission's determinations of which services are now auctionable. Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz, WT Docket No. 99-87, *Notice of Proposed Rule Making*, FCC 99-52 (rel. Mar. 25, 1999) ("*BBA NPRM*").

<sup>6</sup> 47 U.S.C. § 309(j).

- Examines the impact of the Balanced Budget Act on the proposal in the *Notice* to allocate the 932/941 MHz and 928/959 MHz bands for subscriber-based services and to award initial licenses for these bands through competitive bidding.
- Seeks comment on whether passage of the Balanced Budget Act has affected the proposal in the *Notice* to reserve five channel pairs in the 932/941 MHz MAS bands for Federal Government/public safety use.
- Seeks comment on whether passage of the Balanced Budget Act has affected the proposal in the *Notice* to reserve the 928/952/956 MHz MAS bands exclusively for private, internal use and to continue to issue licenses for these bands on a site-by-site basis.
- Seeks comment on how to resolve mutually exclusive MAS applications received from parties exempted from the competitive bidding process, assuming that we reserve channels in either the 932/941 MHz or 928/952/956 MHz bands, or both, for public safety radio services.
- Seeks comment on specific size standards to be applied to the small business definition, and the offering of "tiered bidding credits" for the different sizes of small businesses.
- Immediately suspends the acceptance and processing of applications in the 928/952/956 MHz bands, regardless of the type of service proposed by the applicant, except certain pending applications, applications for minor modifications (as defined herein), and applications for license assignment or transfer of control during the pendency of this rule making.

### III. BACKGROUND

3. Historically, the primary users of MAS spectrum have been the power, petroleum and security industries for various alarm, control, interrogation and status reporting requirements, and the paging industry for control of multiple paging transmitters in the same general geographic area.<sup>7</sup> In 1989, the Commission allocated forty 12.5-kilohertz channel pairs in the 932-932.5 MHz and 941-941.5 MHz bands (932/941 MHz bands) for both Federal Government and non-Governmental point-to-multipoint use.<sup>8</sup> The Interdepartment Radio Advisory Committee (IRAC) of the National Telecommunications and Information Administration (NTIA) was to coordinate Governmental and non-Governmental use.<sup>9</sup> By

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<sup>7</sup> See *Notice*, 12 FCC Rcd at 7976.

<sup>8</sup> See Amendment of Parts 1, 21, 22, 74, and 94 of the Commission's Rules to Establish Service and Technical Rules for Government and non-Government Fixed Service Usage of the Frequency Bands 932-935 MHz and 941-944 MHz, GN Docket No. 82-243, *Second Report and Order*, 4 FCC Rcd 2012 (1989) ("*932/941 MHz Second Report and Order*").

<sup>9</sup> See *Notice*, 12 FCC Rcd at 7977.

*Public Notice*, the Commission stated it would open five two-day filing windows for licenses authorizing use of these bands during January and February, 1992, and thereafter license applications on a first-come, first-served basis.<sup>10</sup> In the event we received mutually exclusive applications, we indicated that lotteries would be used to select among applicants.<sup>11</sup> In response to the series of filing windows, over 50,000 applications were filed for the available forty 12.5-kilohertz channel pairs in these bands.

4. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 ("Budget Act")<sup>12</sup> added Section 309(j) to the Communications Act.<sup>13</sup> Under the Budget Act, Section 309(j) permitted the Commission, for certain classes of licenses, to employ competitive bidding procedures to choose among mutually exclusive applications for initial license grants or authorizations. Specifically, the Commission was authorized to grant licenses by competitive bidding if the "principal use" of the spectrum to be auctioned was to provide "subscriber based services," and if auctioning would promote the public interest objectives stated in Section 309(j)(3).<sup>14</sup> As a result, the Commission commenced a proceeding to examine whether licenses for various services should be assigned by competitive bidding.<sup>15</sup> Based on the record in that proceeding and the requirements of the statute, the *Competitive Bidding Second Report and Order* established rules governing the types of services and licenses that may be subject to auctions.<sup>16</sup> In that context, the Commission determined at that time that MAS, part of the Private Operational Fixed Microwave ("POFM") service,<sup>17</sup> did not qualify as subscriber-based and, therefore, should not be subject

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<sup>10</sup> *Public Notice*, DA 91-1422, 6 FCC Rcd 7242 (rel. Nov. 27, 1991).

<sup>11</sup> *Id.*

<sup>12</sup> Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993); see H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 480-89 (1993).

<sup>13</sup> 47 U.S.C. § 309(j).

<sup>14</sup> See 47 U.S.C. § 309(j)(1)-(3) (1996).

<sup>15</sup> See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Notice of Proposed Rule Making*, 8 FCC Rcd 7635 (1993) ("*Competitive Bidding NPRM*").

<sup>16</sup> Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348 (1994) ("*Competitive Bidding Second Report and Order*"). See also Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994) ("*Competitive Bidding Second MO&O*").

<sup>17</sup> The former Part 94 of the Commission's Rules had contained the rules for the POFM Service. Part 94 eligibles were persons (individuals, partnerships, associations, joint stock companies, trusts, or corporations), governmental entities, or agencies eligible to provide Private Operational Fixed Service under Parts 80, 87, or 90, or entities proposing to provide such service to such POFM eligibles, e.g. on a private carrier basis. The POFM Service includes any use of microwave frequencies other than for common carrier purposes (which were governed by then-Part 21). Effective August 1, 1996, however, the Commission consolidated the service rules for fixed microwave operations, e.g., Parts 21 and 94 of the rules, into a single Part 101. See In the Matter of Reorganization

to competitive bidding.<sup>18</sup> Thus, the Commission decided that it would not be appropriate to use competitive bidding for the award of those POFM MAS licenses for which 50,000-plus applications were pending, even in the event of mutual exclusivity.<sup>19</sup> Subsequently, the Commission undertook a preliminary examination of the pending applications and ascertained that the vast majority were filed by applicants seemingly proposing to use their licenses principally to provide subscriber-based service.<sup>20</sup>

5. Because of the overwhelming interest in commercial operations of MAS facilities and the substantial number of applications filed for the 932/941 MHz bands, the Commission was concerned that the analysis made in the Competitive Bidding docket regarding MAS might be inaccurate. As a result, in February 1997, the Commission issued the *Notice* to reexamine current and future uses of, and demand for, MAS spectrum. The *Notice* sought to determine the appropriate method of license distribution for the numerous pending applications. It also sought to establish a streamlined regulatory framework that would provide licensees sufficient flexibility to meet the public's MAS needs. The *Notice* reached tentative conclusions, and sought comment on, as described more fully below, issues relating to the authority to use competitive bidding, the allocation of the MAS bands, site-based versus geographic area licensing, particularly where the principal use of the spectrum would involve, or was reasonably likely to involve, "subscriber-based" services, service areas, operational and technical flexibility, the treatment of incumbents, spectrum block size, partitioning and disaggregation, construction requirements, regulatory status, the establishment of a public safety set-aside, and the disposition of previously-filed applications.<sup>21</sup> The *Notice* also temporarily suspended the acceptance and processing of some MAS applications pending resolution of the issues in the proceeding.<sup>22</sup>

6. On August 5, 1997, the President signed the Balanced Budget Act. The Balanced Budget Act, *inter alia*, eliminated the Commission's authority to issue licenses or permits by random selection after July 1, 1997, with the exception of licenses or permits for noncommercial educational radio and

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and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, WT Docket No. 94-148; Amendment of Part 21 of the Commission's Rules for the Domestic Public Fixed Radio Services, CC Docket No. 93-2, *Report and Order*, 11 FCC Rcd 13,449 (1996).

<sup>18</sup> See *Competitive Bidding NPRM*, 8 FCC Rcd at 7659-60; *Competitive Bidding Second Report and Order* 9 FCC Rcd at 2354.

<sup>19</sup> *Competitive Bidding NPRM*, 8 FCC Rcd at 7660 n.156; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2354 n.25.

<sup>20</sup> See *Notice*, 12 FCC Rcd at 7978.

<sup>21</sup> *Id.* at 7979-99.

<sup>22</sup> *Id.* at 8003-04.

television stations.<sup>23</sup> Because the Balanced Budget Act eliminated our authority to use lotteries, and new licensing rules had yet to be finalized, the Public Safety and Private Wireless Division and the Commercial Wireless Division of the Wireless Telecommunications Bureau dismissed the pending 50,000-plus pending MAS applications to use the 932/941 MHz bands.<sup>24</sup> In addition, the Balanced Budget Act amended Section 309(j) of the Communications Act to require the Commission to award mutually exclusive applications for initial licenses or permits using competitive bidding procedures, with very limited exceptions.<sup>25</sup> Specifically, Section 309(j) now provides that competitive bidding must be employed in instances of mutually exclusive applications, while exempting certain licenses, most notably those for "public safety radio services."<sup>26</sup> "Public safety radio services" include "private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that -- (i) are used to protect the safety of life, health, or property; and (ii) are not made commercially available to the public."<sup>27</sup>

7. The comments received in response to the *Notice* generally support the Commission's proposals, particularly those advocating simplified licensing procedures and increased operational and technical flexibility for MAS licensees.<sup>28</sup> The comments were divided, however, regarding the proposal to award licenses by a system of competitive bidding.<sup>29</sup> Although the Commission received thorough and diverse public input in response to the *Notice*, we believe that the issues in this proceeding cannot be decided fairly solely on the basis of the record compiled in response to the *Notice*, because parties have not been afforded an opportunity to assess the impact of the Balanced Budget Act on the Commission's outstanding proposals for MAS spectrum. Notably, the Balanced Budget Act has altered the criteria for determining whether or not applications for a particular service or class of frequencies are subject to competitive bidding. As a result, we believe that the public interest would be furthered by giving

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<sup>23</sup> Balanced Budget Act at § 3002(a)(2)(B)(5). In the Conference Report that accompanies the legislation, these changes are characterized as providing for "expanded" auction authority. H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 572 ("Conference Report").

<sup>24</sup> See In the Matter of Amendment of the Commission's Rules Regarding Multiple Address Systems, DA 98-1889, Order, 13 Communications Reg. (P&F) 606 (WTB PSPWD rel. Sept. 17, 1998) (modified by *Erratum*, DA 98-2038 (WTB PSPWD, CWD, rel. October 7, 1998)) ("*MAS Dismissal Order*").

<sup>25</sup> Balanced Budget Act at § 3002(a)(1)(A)(1)-(2). It was determined that, because the 50,000-plus pending applications were mutually exclusive, and because the overwhelming majority of these applications proposed services that were not exempted from competitive bidding under the Balanced Budget Act, the Commission was without authority to process them pursuant to the rules and requirements under which they were filed. Accordingly, they had to be dismissed. *MAS Dismissal Order* at ¶¶2-6.

<sup>26</sup> Balanced Budget Act at § 3002(a)(1)(A)(1)-(2).

<sup>27</sup> *Id.* at § 3002(a)(2)(A).

<sup>28</sup> See, e.g., CellNet Comments at 31-2; Radscan Comments at 21-2.

<sup>29</sup> See, e.g., Radscan Comments at 1; Itron Comments at 6-7.

interested parties, particularly the predominant users of MAS spectrum, a further opportunity to comment. For example, as stated in the *Notice*, a review of the Commission's licensing database has determined that many of the channels in the 928/952/956 MHz bands are used to provide services that may potentially be covered by the public safety auction exemption in the Balanced Budget Act.<sup>30</sup> Hence, we believe that a further opportunity for comment will result in a more comprehensive record on which to base decisions regarding the future licensing of MAS spectrum.

#### IV. DISCUSSION

##### A. Spectrum Allocation

###### 1. Background

8. Initially, in establishing the MAS service, the Commission allocated twenty 25-kilohertz channel pairs in the 928-929 MHz and 952-953 MHz bands for exclusive, private use by Power Radio Service eligibles for energy distribution automation.<sup>31</sup> The Commission later allocated fourteen 25-kilohertz channel pairs in the same bands and eight 25-kilohertz unpaired channels in the 956 MHz band for private MAS operations by all entities eligible for the POFM Service under former Part 94 of the Rules.<sup>32</sup> It also allocated six 25-kilohertz paired channels in the 928 and 959 MHz bands for common carrier Domestic Public Land Mobile (DPLM) use under Part 22 of our Rules for control of wide-area paging networks.<sup>33</sup> The Commission instituted sharing criteria to facilitate the efficient use of this allocation approach. Specifically, if the MAS channels available under the POFM service have been licensed in a given area, Part 101 eligibles may apply for MAS channels allocated for DPLM operations, and *vice versa*.<sup>34</sup> In 1988, the Commission established a standard mileage separation and reduced the channel spacing from 25 kilohertz to 12.5 kilohertz, in an effort to increase spectrum efficiency and reduce

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<sup>30</sup> See *Notice*, 12 FCC Rcd at 7980.

<sup>31</sup> See In the Matter of Amendment of Parts 2 and 94 of the Commission's Rules to Provide Regulations for Use of Radio in Public Utility Distribution Automation Systems, SS Docket No. 79-18, *Report and Order*, 46 Fed. Reg. 9950 (Jan. 30, 1981). Energy distribution automation systems are a type of MAS operation that use remote radio transceivers located at customers' premises to enable utilities to control energy peak usage through load management techniques.

<sup>32</sup> See In the Matter of Amendment of Parts 2 of the Commission's Rules Governing Frequency Allocations, 22 of the Commission's Rules Governing the Public Mobile Radio Services, and 94 of the Rules Governing the Private Operational-Fixed (Microwave) Service to Reallocate Forty-Eight 25 kHz Channels in the 900 MHz Range for Multiple Address Radio Systems; and Amendment of Parts 22 and 94 to Establish a New Standard for Frequency Tolerance on 900 MHz Multiple Address Channels, SS Docket No. 79-18, *Second Report and Order*, 88 FCC 2d 1173 (1982).

<sup>33</sup> See 47 C.F.R. § 22.623.

<sup>34</sup> See 47 C.F.R. § 101.147(b).

regulatory burdens.<sup>35</sup> Finally, as noted earlier, the Commission made forty 12.5-kilohertz channel pairs in the 932-932.5 MHz and 941-941.5 MHz bands available for both Federal Government and non-Governmental use.<sup>36</sup>

## 2. Proposals in the *Notice*

9. As described more fully in the paragraphs that follow, the *Notice* proposed a variety of changes for the MAS spectrum allocation. The Commission proposed to designate most of the spectrum in the 932/941 MHz bands and all of the spectrum in the 928/959 MHz bands for subscriber-based services, and to use competitive bidding to choose among mutually exclusive applications for licenses in these bands.<sup>37</sup> The Commission also proposed to designate the 928/952/956 MHz bands exclusively for private, internal use, and not utilize competitive bidding to select among mutually exclusive applications in these bands.<sup>38</sup>

10. Pursuant to Section 309(j)(6)(E) of the Communications Act, the Commission has an "obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."<sup>39</sup> The Commission previously has interpreted Section 309(j)(6)(E) to impose an obligation to attempt to avoid mutual exclusivity in defining licensing schemes for commercial services only when it would further the public interest goals of Section 309(j)(3) of the Communications Act.<sup>40</sup>

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<sup>35</sup> See In the Matter of Amendment of §§ 22.501(g)(2) and 94.65(a)(1) of the Rules and Regulations to Re-Channel the 900 MHz Multiple Address Frequencies; Amendment of § 94.65(a)(1) of the Rules to Revise Footnote 3 in the Frequency Table to Make the Frequencies Available for Use by any Part 94 Eligible; Amendment of Part 2 and §§ 94.63(d)(5) and 94.65 (a)(1) Footnote 3 of the Rules to Permit Operation of Mobile Remote Meter Reading Systems on a Primary Basis on the Exclusive Power Radio Service Frequencies in 952.3625-952.8375 MHz Band; Amendment of Part 94 of the Commission's Rules to Permit Intrasystem Communications Among Multiple Address System Master Stations, PR Docket No. 87-5, *Report and Order*, 3 FCC Rcd 1564 (1988).

<sup>36</sup> 932/941 MHz *Second Report and Order*, 4 FCC Rcd at 2012.

<sup>37</sup> *Notice*, 12 FCC Rcd at 7979-80, 97.

<sup>38</sup> *Id.* at 7980.

<sup>39</sup> 47 U.S.C. § 309(j)(6)(E).

<sup>40</sup> See, e.g., Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Second Report and Order*, 12 FCC Rcd 19079, 19104, 19154 (1997). The public interest objectives stated in Section 309(j)(3) include: (A) the rapid development and deployment of new technologies to the public; (B) promoting economic opportunity and competition, and ensuring the ready accessibility of new technologies to the public; (C) recovery for the public a portion of the value of the spectrum made available for commercial use, and avoiding unjust enrichment; and (D) efficient and intensive use of the spectrum. Note that after the *Notice* was adopted, Congress added a new provision to Section 309(j)(3) requiring the Commission to ensure that an adequate period is allowed for notice



In the *Notice*, the Commission considered the Section 309(j)(3) public interest goals and tentatively concluded that the proposed change in the MAS licensing scheme comports with those objectives.<sup>41</sup> Subsequent to the *Notice*, Congress highlighted in the Balanced Budget Act the Commission's obligation under Section 309(j)(6)(E) by referencing that obligation in the general auction authority provision.<sup>42</sup> The Commission recently sought comment on whether that reference changes the scope or content of the Commission's obligation under Section 309(j)(6)(E).<sup>43</sup>

11. *932/941 MHz Bands.* The first category of MAS spectrum, consisting of one megahertz of paired spectrum in the 932-932.5 MHz and 941-941.5 MHz bands is available for both Federal Government and non-Governmental use.<sup>44</sup> These 12.5-kilohertz channels are authorized for both common carrier and private radio use on a co-primary basis.<sup>45</sup> According to the FCC's licensing databases, only two Federal Government licensees utilize these bands. No non-Governmental users are licensed on these bands, and, as noted above, over 50,000 applications for non-Governmental use of these bands were dismissed. In the *Notice*, the Commission proposed to allocate these bands for subscriber-based uses.<sup>46</sup> It based this proposal on the fact that the majority of applicants seemingly proposed to use their licenses to offer subscriber-based services.<sup>47</sup> Based on its tentative conclusion that the 932/941 MHz bands would be used by licensees seeking to provide subscriber-based services, the Commission proposed to use competitive bidding procedures to select between mutually exclusive initial applications for MAS licenses

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and comment on proposed auction procedures prior to the issuance of bidding rules, and after such bidding rules are issued, an adequate period is permitted so that interested parties have sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services. *See* 47 U.S.C. § 309(j)(3)(E).

<sup>41</sup> *See Notice*, 12 FCC Rcd at 7997.

<sup>42</sup> The current language of Section 309(j)(1) provides that "[i]f, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements this subsection." 47 U.S.C. § 309(j)(1) (1998).

<sup>43</sup> *BBA NPRM* at paras. 58-64 .

<sup>44</sup> *See* 47 C.F.R. § 101.147(b).

<sup>45</sup> *See 932/941 MHz Second Report and Order*, 4 FCC Rcd at 2014; 47 C.F.R. § 101.147(b)(4).

<sup>46</sup> *See Notice*, 12 FCC Rcd at 7980.

<sup>47</sup> *Id.* at 7979.

in these bands.<sup>48</sup> The Commission also proposed to set aside five of the 40 channel pairs in these bands for public safety/Federal Government use and to issue these licenses on a first come, first served basis.<sup>49</sup>

12. *928/959 MHz Bands.* The second category of MAS spectrum, consisting of 300 kilohertz of paired spectrum in the 928.85-929 MHz and 959.85-960 MHz bands (928/959 MHz bands), is allocated for, and used primarily by, common carrier licensees under Part 22 of our Rules, and may also be used for private radio licensees pursuant to certain sharing criteria.<sup>50</sup> In the *Notice*, the Commission tentatively concluded that because the majority use of these bands is for the provision of subscriber-based services, the 928/959 MHz bands should be designated for such services.<sup>51</sup> Because of the current and foreseen subscriber-based use of these channels, the Commission proposed to use competitive bidding procedures to select among mutually exclusive initial applications for licenses in these bands.<sup>52</sup>

13. *928/952/956 MHz Bands.* The third category of MAS spectrum, consisting of 1.7 megahertz of paired spectrum in the 928-928.85 and 952-952.85 MHz bands and 200 kilohertz of unpaired spectrum in the 956.25-956.45 MHz bands (928/952/956 MHz bands), is allocated for, and used primarily by, private radio licensees, and may be used by common carriers pursuant to certain sharing criteria.<sup>53</sup> While some of these private radio licensees share some or all of their capacity on a for-profit, third-party, private carrier basis,<sup>54</sup> the Commission tentatively concluded that the majority of the channels in these bands are used for private systems to satisfy internal communications needs. In the *Notice*, therefore, we proposed to designate the 928/952/956 MHz bands exclusively for private, internal use.<sup>55</sup> Under this approach, further subscriber-based use of these channels by future licensees, whether on a private carrier basis or through sharing with common carrier licensees, would be prohibited.<sup>56</sup> However, the Commission would grandfather existing subscriber-based services currently being provided on these MAS frequencies.<sup>57</sup>

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<sup>48</sup> *Id.* at 7997.

<sup>49</sup> *Id.* at 8002-03.

<sup>50</sup> *See* 47 C.F.R. §§ 22.621 and 101.147(b), Table 5.

<sup>51</sup> *See Notice*, 12 FCC Rcd at 7979-80.

<sup>52</sup> *Id.* at 7997.

<sup>53</sup> *See* 47 C.F.R. §§ 22.621 and 101.147(b), Table 2.

<sup>54</sup> *See generally National Ass'n of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) (private carrier concept).

<sup>55</sup> *See Notice*, 12 FCC Rcd at 7980.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

## B. The Impact of the Balanced Budget Act of 1997

14. In February, 1998, Microwave Data Systems, Inc. (MDS) filed an ex parte presentation urging the Commission to commence licensing in the 932/941 MHz bands.<sup>58</sup> We agree with MDS that it is important for the Commission to license this spectrum as expeditiously as feasible. The purpose of the release of this *Further Notice* is to expedite the resolution of outstanding issues so that the Commission can commence such licensing. Therefore, we believe that the adoption of this *Further Notice* is responsive to MDS' request. Insofar as MDS seeks immediate licensing of these bands without regard to the conclusion of this proceeding, its request is denied.

15. The Commission proposed in the *Notice* to choose among mutually exclusive initial applications for use of the 932/941 and 928/959 MHz bands through a system of competitive bidding.<sup>59</sup> The Commission did not propose at that time to use competitive bidding to issue initial licenses for the 928/952/956 MHz bands because of its tentative conclusion that the majority of these channels are used by private systems to satisfy internal communications needs.<sup>60</sup> We now assess the impact of the passage of the Balanced Budget Act on these proposals and tentative conclusions.

### 1. Authority to Employ Competitive Bidding Procedures

16. The Commission premised its initial proposal regarding the use of competitive bidding for licenses for MAS spectrum on the former language of Section 309(j) of the Communications Act. As stated above, the former language of Section 309(j) provided that mutually exclusive applications for initial licenses or construction permits would be subject to competitive bidding if: (1) the principal use of the spectrum involved, or was reasonably likely to involve, the provision of subscriber-based services; and (2) a system of competitive bidding would promote the objectives of Section 309(j)(3).<sup>61</sup> Significantly, the Balanced Budget Act revised Section 309(j) to change the criteria for determining auctionability of spectrum, removing the requirement that the principal use of the spectrum be for subscription-based services. As a result, we believe that it is both appropriate and necessary for us to revisit the outstanding proposals for the use of competitive bidding procedures for MAS spectrum to ensure that such approaches are consistent with the statutory criteria.

17. The current language of Section 309(j)(1) provides that "[i]f, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the

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<sup>58</sup> See Petition of Microwave Data Systems for Commencement of Licensing in the 932/941 MHz Bands (filed Feb. 2, 1998) (MDS Petition).

<sup>59</sup> *Notice* at 7979-80, 97.

<sup>60</sup> *Id.* at 7980.

<sup>61</sup> See 47 U.S.C. § 309(j)(1)-(3) (1996).

requirements of this subsection."<sup>62</sup> As noted above, we are currently examining the issue of whether the Balanced Budget Act has changed the scope of the Commission's obligation under Section 309(j)(6)(E).<sup>63</sup> We seek comment on whether the new reference to Section 309(j)(6)(E) in the general auction authority provision has any effect on our tentative conclusion in the *Notice* that it is in the public interest to use competitive bidding to resolve mutually exclusive applications for initial MAS licenses.

## 2. Exemptions from Competitive Bidding

18. The remaining issue, therefore, is whether or not the auction exemptions set forth in Section 309(j)(2) apply to MAS spectrum. We note first that the exemptions for digital television service and educational broadcasting clearly do not apply.<sup>64</sup> The most relevant exemption is for "public safety radio services" which are defined to include "private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that -- (i) are used to protect the safety of life, health, or property; and (ii) are not made commercially available to the public."<sup>65</sup> The Conference Report expands on this class of services, lending support for a conclusion that the "public safety radio services" exemption applies to a broader class of services than what the Commission traditionally has considered as falling under the Public Safety category.<sup>66</sup> It states that the exemption includes "private internal radio services" used by utilities, railroads, metropolitan transit systems, pipelines, private ambulances, volunteer fire departments, and radio services used by not-for-profit organizations that offer emergency road services, such as the American Automobile Association (AAA).<sup>67</sup>

19. *932/941 MHz and 928/959 MHz bands.* We tentatively conclude that the proposed use of the 932/941 MHz bands and the current MAS use of the 928/959 MHz bands do not fall within the auction exemption for public safety radio services. Regarding the 932/941 MHz bands, we note that the substantial majority of dismissed applications apparently did not propose the use of these channels for the provision of public safety radio services.<sup>68</sup> Moreover, as we have noted throughout this proceeding, a majority of the dismissed applications for these bands proposed the offering of services of a commercial

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<sup>62</sup> 47 U.S.C. § 309(j)(1) (1998).

<sup>63</sup> *See supra* paragraph 10.

<sup>64</sup> *See* 47 U.S.C. § 309(j)(2)(B)-(C).

<sup>65</sup> 47 U.S.C. § 309(j)(2)(A).

<sup>66</sup> *See* Conference Report at 572.; *see, e.g.* Part 90, Subpart B of the Commission's Rules. 47 C.F.R. Part 90, Subpart B.

<sup>67</sup> Conference Report at 572.

<sup>68</sup> *See Notice*, 12 FCC Rcd at 7979-80.

nature.<sup>69</sup> Further, the Commission has never allocated these 932/941 MHz bands specifically for public safety radio services.<sup>70</sup> Meanwhile, Part 22 commercial mobile radio service (CMRS) licensees are the primary users of the 928/959 MHz bands and utilize their MAS spectrum for operational control of their public mobile base transmitters.<sup>71</sup> We tentatively conclude, therefore, that licensing of the 932/941 MHz bands and the 928/959 MHz bands for MAS services does not come within the "public safety radio services" exemption from competitive bidding and, thus, we continue to believe that competitive bidding should be the means by which licenses are issued for these bands. Moreover, we believe that the Balanced Budget Act now requires us to use competitive bidding for these bands. We seek comment on this tentative conclusion.

20. *928/952/956 MHz bands.* Because some of the current services provided by MAS licensees on the 928/952/956 MHz bands may fall into the broader exemption class, we seek comment on the level of representation of "public safety radio services," as defined in the Balanced Budget Act, among current uses of the 928/952/956 MHz bands. If it appears that the broader "public safety radio services" category reflects the current dominant use of these bands, we seek comment on allocating part, or all, of the 928/952/956 MHz bands for such "public safety radio services." If we adopt such an allocation, while we would prohibit all future licensees from offering services not meeting this criteria, we seek comment on whether the Commission should grandfather all existing services currently being provided in these bands.

### 3. Licensing in the 928/952/956 MHz Bands

21. We seek comment on the licensing approach that should be adopted for the 928/952/956 MHz bands. We tentatively conclude that site-by-site licensing should be maintained if we reserve the bands exclusively for "public safety radio services." However, if we ultimately conclude that the current and foreseeable use of these bands does not comport with that statutory definition and we do not restrict eligibility for these bands accordingly, our tentative conclusion is that we would be required to grant licenses for use of these bands through a system of competitive bidding. In such instance, we propose to adopt a system of geographic area licensing. We have concluded in other services that licensing based on pre-defined service areas poses significant advantages over site-based licensing because of the greater operational flexibility it affords licensees, its inherent ability to simplify system expansion, and its easing of the administrative burden on the Commission.<sup>72</sup> We seek comment on these conclusions and proposals.

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<sup>69</sup> See, e.g., *MAS Dismissal Order* at ¶¶ 4-5.

<sup>70</sup> As discussed later in this *Further Notice*, however, we have proposed a five-channel set-aside for public safety/Federal Government use.

<sup>71</sup> See 47 U.S.C. §§ 22.621, 22.623.

<sup>72</sup> See, e.g., In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz

### C. Frequency Set-Aside for Services Exempt from Competitive Bidding

22. Although we do not tentatively conclude that the 932/941 MHz bands should be reserved for public safety radio services, we note that the *Notice* proposed to set aside five of the 40 channel pairs for public safety/Federal Government use.<sup>73</sup> In general, commenters expressed support for this proposal.<sup>74</sup> We believe such an approach may effectively afford both public safety and non-public safety users access to these unencumbered bands and further the Congressional intent of increasing the public safety community's access to frequencies without having to compete in an auction. We seek comment, therefore, on whether we should retain this proposal. We also seek comment on how we should determine eligibility for such a set-aside. For example, should we use the traditional public safety service categories outlined in the Commission's Rules,<sup>75</sup> or should we expand eligibility to encompass those services that fall under the "public safety radio service" definition provided for in the Balanced Budget Act's categorical exemption from competitive bidding? We also seek comment on the need for this set-aside if we decide to reserve part or all of the 928/952/956 MHz bands for "public safety radio service" use, as addressed above.<sup>76</sup>

23. In the absence of a five-channel set-aside in the 932/941 MHz bands for public safety/Federal Government use, we seek comment on how we should treat an application for the 932/941 MHz bands that proposes a "public safety radio service." We believe that such an applicant would be required to participate in competitive bidding because the spectrum would not be allocated specifically for public safety radio services. We do not interpret the Balanced Budget Act to mandate that when a public safety radio service applicant seeks a license, it may choose whatever segment of the spectrum it desires, and by applying for the license, remove those frequencies from the competitive bidding process.<sup>77</sup>

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Band Allotted to the Specialized Mobile Radio Pool, *PR Docket Nos. 89-553, 93-144, GN Docket No. 93-252, Third Report and Order*, 9 FCC Rcd 7988, 8044 (1994) ("*SMR Third Report and Order*").

<sup>73</sup> *Notice*, 12 FCC Rcd at 8002-03.

<sup>74</sup> See, e.g., Association of Public-Safety Communications Officials-International, Inc. Comments at 1-2; Microwave Data Systems Comments at 15; Washington Suburban Sanitary Commission Comments at 13; American Water Works Association Comments at 23.

<sup>75</sup> For example, we could define a "public safety eligible" as any person or government entity eligible for licensing under 47 C.F.R. Part 90, Subpart B.

<sup>76</sup> Because these bands are allocated for Federal Government use as well as non-Governmental use, the Commission cannot foreclose Federal Government use absent consent from NTIA.

<sup>77</sup> For example, Section 337(c) of the Communications Act, added pursuant to the Balanced Budget Act, provides that eligible public safety entities may obtain unassigned spectrum not otherwise allocated for public safety services, without participating in competitive bidding. An applicant seeking assignment of such spectrum must satisfy several criteria by demonstrating that: (a) no other spectrum allocated to public safety services is immediately available to satisfy the requested use; (b) the requested use will not cause harmful interference to other spectrum users entitled to protection; (c) the proposed use of the unassigned frequency is consistent with other allocations for

Such a result would complicate the spectrum licensing process and foster an environment of uncertainty among all other prospective licensees. We seek comment on the impact of this interpretation.

**D. Resolution of Mutually Exclusive Applications for Services Exempt from Competitive Bidding**

24. In the event that the Commission reserves channels on either the 932/941 MHz or 928/952/956 MHz bands, or both, for public safety radio services that are exempt from competitive bidding, we tentatively conclude that licensing on a first-come, first-served basis would be the most effective licensing approach. Under such an approach, we believe that the incidents of mutual exclusivity would be rare because the site-based applications would be frequency coordinated prior to their filing with the Commission and subject to a filing window. Nonetheless, because it is possible that mutual exclusivity could arise, we seek comment on how we should resolve mutual exclusivity in such instances. As noted previously, the Balanced Budget Act terminated the Commission's authority to use lotteries to choose among mutually exclusive applications.<sup>78</sup> We are therefore foreclosed from adopting our proposal in the *Notice* to use random selection in the event that we receive mutually exclusive applications for licenses to use channels in a public-safety/Federal Government set-aside.<sup>79</sup> In this regard, we seek comment on a proposal offered by Microwave Data Systems ("MDS") that if mutually exclusive applications are filed, the Commission should grant all applications that reach the coordinator on the day that the mutual exclusivity is created, provided that they are in order, and that the licensees be required to share the channels under whatever private arrangements they negotiate.<sup>80</sup> We also seek comment on other possible alternatives.

**E. Competitive Bidding Procedures**

25. In the *Notice*, the Commission sought comment generally on establishment of a "small business" definition for MAS.<sup>81</sup> In this *Further Notice*, we seek comment on the specific size standards that should be applied to any small business definition we decide to adopt for the MAS service. In the *Part 1 Third Report and Order*, we amended our general competitive bidding rules to establish a uniform set of provisions for all auctionable services, which allows us to conduct our auctions in a consistent,

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the provision of such services within the geographic area; (d) the unassigned frequency has been allocated for its present use for at least two years; and (e) granting the application is in the public interest. See 47 U.S.C. 337(c)(1).

<sup>78</sup> See Balanced Budget Act § 3002(a)(2)(B)(5).

<sup>79</sup> See *Notice*, 12 FCC Rcd at 8003.

<sup>80</sup> MDS Petition at 5.

<sup>81</sup> *Notice*, 12 FCC Rcd at 8000.

efficient, and effective manner.<sup>82</sup> We amended our general rules governing auction methodology and procedures to reflect changes made to the auction process through service-specific rules. However, we also decided in that proceeding to continue our practice of defining small business size standards on a service-specific basis.<sup>83</sup> Based on the record established in the Part 1 proceeding, we will prescribe designated entity provisions that will govern the MAS service.<sup>84</sup>

26. In the *Competitive Bidding Second MO&O*, we also indicated that we would establish definitions for "small business" on a service-by-service basis.<sup>85</sup> For example, the Commission adopted a \$40 million small business definition for both narrowband and broadband PCS,<sup>86</sup> and the Multipoint Distribution Service (MDS).<sup>87</sup> For the 900 MHz Specialized Mobile Radio Service and the 800 MHz Specialized Mobile Radio Service, however, the Commission, used a two-tiered approach, adopting a definition of "small" businesses (the applicant, together with attributable investors and affiliates, has average gross revenues for the three preceding years of \$15 million or less) and "very small" businesses (the applicant, including attributable investors and affiliates, must have average gross revenues for the three preceding years of \$3 million or less).<sup>88</sup> We seek comment on whether we should apply one of the

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<sup>82</sup> See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) (modified by *Erratum*, DA 98-419 (rel. March 2, 1998)) ("*Part 1 Third Report and Order*").

<sup>83</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 388.

<sup>84</sup> The Commission makes no representations or warranties about the use of this spectrum for particular services. Applicants should be aware that an FCC auction represents an opportunity to become an FCC licensee in this service, subject to certain conditions and regulations. An FCC auction does not constitute an endorsement by the FCC of any particular services, technologies or products, nor does an FCC license constitute a guarantee of business success. Applicants should perform their individual due diligence before proceeding as they would with any new business venture.

<sup>85</sup> Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Second Competitive Bidding MO&O*, 9 FCC Rcd at 7268-69.

<sup>86</sup> Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 475, 196 (1995); *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5581-5584.

<sup>87</sup> Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and the Instructional Television Fixed Service, MM-Docket No. 94-131, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589, 9671-72 (1995) ("*MDS Report and Order*").

<sup>88</sup> Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-252, and Implementation of Section 3(n) and 322 of the Communications Act, GN



existing "small business" definitions to the MAS service, or whether we should adopt a new definition. We specifically propose to define a small business as an entity with average annual gross revenues for the preceding three years not to exceed \$15 million. We also propose to define a very small business as an entity with average annual gross revenues for the preceding three years not to exceed \$3 million. These definitions match those adopted for the 800 MHz Specialized Mobile Radio, 900 MHz Specialized Mobile Radio and Phase II 220 MHz services, which have been approved in those contexts by the Small Business Administration.<sup>89</sup> The Small Business Administration has approved the proposed definitions in this *Further Notice*.<sup>90</sup> Commenters should also discuss the level of capital commitment that is likely to be required to purchase an MAS license at auction and create a viable business. Our goal, should we adopt a definition and associated special provision(s) for small businesses, will be to ensure the participation of small businesses in the auction and in the provision of service.

27. We also seek comment on the possibility of offering "tiered" bidding credits for different sizes of small businesses. We note that small businesses may vary in their ability to raise capital depending on their size and gross revenues. By offering different levels of bidding credits depending on the size of the small business, we could increase the likelihood that the full range of small businesses would be able to participate in an auction and potentially provide service. We therefore propose to establish two levels of bidding credits, consistent with levels adopted in the Part 1 proceeding.<sup>91</sup> As we stated in the Part 1 proceeding, we believe that bidding credits will enable small businesses to successfully compete in future auctions.<sup>92</sup> Accordingly, we propose that small businesses receive a 25 percent bidding

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Docket No. 93-252, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639, 2675-77 (1995) ("*SMR Order*").

<sup>89</sup> See, e.g., Letter to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, re: Approval of Small Business Size Standards -- Competitive Bidding Rules for 800 MHz Specialized Mobile Radio Services (October 27, 1997). See also Letter to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration (January 6, 1998) (Approval of Small Business Size Standards for the Phase II 220 MHz Services); Letter to Michele C. Farquhar, Acting Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration (July 24, 1996) (Approval of Small Business Size Standards for the 900 MHz Specialized Mobile Radio Services).

<sup>90</sup> Letter to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, From Aida Alvarez, Administrator, Small Business Administration, re: Request for Approval of Small Business Size Standards -- Competitive Bidding Rules for Multiple Address Services [sic] (MAS) (June 4, 1999).

<sup>91</sup> See *Part 1 Third Report and Order*, 13 FCC Rcd at 403-04; See also 47 C.F.R. § 1.2110(e).

<sup>92</sup> See *Part 1 Third Report and Order*, 13 FCC Rcd at 403-04. The use of tiered bidding credits was successful in enabling small businesses to participate in the 800 MHz Specialized Mobile Radio auction that ended on December 8, 1997 and the Local Multipoint Distribution Service auction that ended on March 25, 1998.

credit and that very small businesses receive a 35 percent bidding credit. Bidding credits for small businesses are not cumulative. We believe that tiered bidding credits can help achieve our statutory objective under Section 309(j)(3)(B) by providing varying sizes of small businesses with a meaningful opportunity to participate in the auction of MAS spectrum. We seek comment on this proposal.

**F. Suspension of Acceptance and Processing of Applications**

28. In light of our actions described above, we will maintain the current suspension of the acceptance of MAS applications for new licenses, amendments, or modifications for the 932/941 MHz and 928/959 MHz bands. Further, effective as of the date of the release of this *Further Notice*, we suspend the acceptance of all MAS applications for new licenses, amendments, or modifications for the 928/952/956 MHz bands.<sup>93</sup> Unlike the suspension ordered in the *Notice*,<sup>94</sup> applications for the 928/952/956 MHz bands will not be accepted, regardless of the type of service proposed by the applicant. We are expanding the suspension on the filing of applications for the 928/952/956 MHz bands due to the uncertainty regarding whether to employ geographic area licensing and auctions for these bands. This suspension is effective until further notice and applies to applications received on or after the date of the release of this *Further Notice*. Any such applications received after this deadline will be returned as unacceptable for filing. We take this action to permit the orderly and effective resolution of the issues in this proceeding. We find that this suspension is in the public interest because absent such action, applications could limit the effectiveness of the decisions made and the standards developed in this proceeding. Further, we note that this action is consistent with the approach we have taken in all other existing services where we have proposed to adopt geographic area licensing and auction rules.<sup>95</sup>

29. Notwithstanding this suspension, we will continue to accept and process all MAS applications for minor modifications<sup>96</sup> or for license assignment or transfer of control under existing procedures. This exception will also apply to amendments to applications for minor modifications. This exception should permit modifications that can improve the efficiency of incumbent MAS operations without affecting the effective and orderly resolution of the issues in this proceeding.

30. With respect to MAS applications for new licenses, amendments, or non-minor modifications which were filed prior to the applicable deadlines (stated above for all applications for the 928/952/956 MHz bands, and February 19, 1997, for the original suspension) and remain pending, we will

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<sup>93</sup> We note that during the six month period prior to the release of this *Further Notice*, the Commission has received an average of seventy 928/952/956 MHz bands applications per month.

<sup>94</sup> See *Notice*, 12 FCC Rcd at 8003-04.

<sup>95</sup> See, e.g., In the Matter of Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, WT Docket No. 96-18, PP Docket No. 93-253, *Notice of Proposed Rule Making*, 11 FCC Rcd 3108, 3136 & n.270 (1996).

<sup>96</sup> See 47 C.F.R. §§ 1.929 and 101.61.

process such applications provided that (1) they are not mutually exclusive with other applications as of the deadlines stated above, and (2) the relevant period for filing competing applications has expired as of the deadlines stated above. We believe that this approach gives the appropriate consideration to those applicants who filed applications prior to our proposed changes and whose applications are not subject to competing applications. Previously-filed applications not meeting the above criteria will be held in abeyance until the conclusion of this proceeding. We will determine later, in accordance with such new rules as are adopted, whether to process or return any such pending applications.

31. These actions are procedural in nature and therefore not subject to the notice and comment, and effective date requirements of the Administrative Procedure Act (APA).<sup>97</sup> Moreover, good cause exists for proceeding in this manner in that doing otherwise would be impractical, unnecessary, and contrary to the public interest because compliance with the APA provisions would undercut the purpose of the interim measures.<sup>98</sup>

## V. CONCLUSION

32. In this *Further Notice*, we seek comment, *inter alia*, on the impact of the Balanced Budget Act on our proposals in the *Notice* to allocate the 932/941 MHz and 928/959 MHz bands for subscriber-based services, to award initial licenses for the 932/941 MHz and 928/959 MHz bands through competitive bidding, and to reserve five channel pairs in the 932/941 MHz bands for federal government/public safety use. In addition, we seek comment on the impact of the Balanced Budget Act on our proposal in the *Notice* to reserve the 928/952/956 MHz bands exclusively for private, internal use and to continue issuing licenses for these bands on a site-by-site basis. We also seek comment in this *Further Notice* on interpreting the "public safety radio service" exemption established by the Balanced Budget Act and its impact upon this proceeding. Finally, this *Further Notice* immediately suspends the acceptance and processing of MAS applications, regardless of the type of service proposed by the applicant. This suspension is effective as of the date of the release of this *Further Notice*. These actions are intended to establish a flexible regulatory framework for MAS that will, among other things, provide opportunities for continued development of competitive new service offerings by allowing flexible use of the spectrum, expedite market entry through streamlined licensing procedures, and promote technological innovation by eliminating unnecessary regulatory burdens.

## VI. PROCEDURAL MATTERS

### A. Ex Parte Rules – Permit-But-Disclose Proceeding

33. This is a permit-but-disclose rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206.

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<sup>97</sup> See 5 U.S.C. §§ 553(b)(A), (d); *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963).

<sup>98</sup> See 5 U.S.C. §§ 553(b)(B), (d)(3).

**B. Initial Regulatory Flexibility Analysis**

34. With respect to this present *Further Notice*, an Initial Regulatory Flexibility Analysis (IRFA), *see generally* 5 U.S.C. § 603, is contained in Appendix A. The IRFA addresses the expected impact on small entities of the proposals made in this document, and requests written comments on these proposals. To fulfill the mandate of the Contract with America Advancement Act of 1996 (Pub. L. No. 104-121, 110 Stat. 847 (1996)) regarding the subsequent Final Regulatory Flexibility Analysis in this proceeding, we ask a number of questions in IRFA regarding the prevalence of small businesses in the Multiple Address System industry. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments regarding this *Further Notice*, and must have a separate and distinct heading designating them as responsive to the IRFA. The Office of Public Affairs, Performance Operations Division shall send a copy of this *Further Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

**C. Initial Paperwork Reduction Act of 1995 Analysis**

35. This *Further Notice* contains a proposed information collection. As part of the Commission's continuing effort to reduce paperwork burdens, we invite the general public, the Office of Management and Budget (OMB), and other agencies to take this opportunity to comment on the information collections contained in this *Further Notice*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Further Notice*; OMB comments are due 60 days after the publication of this *Further Notice* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to *both* of the following: Dorothy Conway, Federal Communications Commission, Room 3-C306, 445 12th St., S.W., Washington, DC 20554, or via the Internet to [dconway@fcc.gov](mailto:dconway@fcc.gov), and Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 -- 17th Street, N.W., Washington DC 20503, or via the Internet to [fain\\_t@al.eop.gov](mailto:fain_t@al.eop.gov). For additional information regarding the information collections contained herein, contact Dorothy Conway, above.

**D. Comment Dates**

36. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, written comments by the public are due on or before 60 days after a summary of this *Further Notice* is published in the Federal Register. Reply comments are due on or before 90 days after this summary is published in the Federal Register. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

37. Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message, "get form <your e-mail address.>" A sample form and directions will be sent in reply.

38. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th St., S.W., Room TW-B204F, Washington, D.C. 20554.

39. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to the Policy and Rules Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, 445 12th St., S.W., Room 4-C330, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labelled with the commenter's name, WT Docket No. 97-81, type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20037.

#### **E. Further Information**

40. For further information concerning this proceeding, contact Ronald E. Quirk, Jr. or Shellie Blakeney, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, at (202) 418-0680, or by electronic mail via the Internet, at [rquirk@fcc.gov](mailto:rquirk@fcc.gov) or [sblakene@fcc.gov](mailto:sblakene@fcc.gov).

### **VII. ORDERING CLAUSES**

41. IT IS ORDERED that the actions of the Commission herein ARE TAKEN pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j).

42. Accordingly, IT IS ORDERED that, effective as of the date of the release of this *Further Notice of Proposed Rule Making and Order*, NO NEW APPLICATIONS WILL BE ACCEPTED FOR FILING in the 932-932.5/941-941.5 MHz bands, the 928.85-929/959.85-960 MHz bands, the 928-928.85/952-952.85 MHz bands and the 956.25-956.45 MHz band. Applications for minor modifications or for license assignment or transfer of control WILL BE ACCEPTED AND PROCESSED under existing procedures.

43. IT IS FURTHER ORDERED that pending applications for licenses in the 928.85-929/959.85-960 MHz bands, the 928-928.85/952-952.85 MHz bands, and the 956.25-956.45 MHz band WILL BE PROCESSED provided that (1) they are not mutually exclusive with other applications as of the date and time of the release of this *Further Notice of Proposed Rule Making and Order*, and (2) the relevant period for filing competing applications has expired as of the date of the release of this *Further Notice of Proposed Rule Making and Order*. Pending applications not meeting these criteria WILL BE HELD IN ABEYANCE until the conclusion of this proceeding. We will determine later, in accordance with such new rules as are adopted, whether to process or return any such pending applications.

44. The interim measures described above will continue until the Commission announces that the acceptance of the subject applications and the processing of applications held in abeyance (if such is determined) will resume. This action is authorized under Sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

## APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS  
Regulatory Flexibility Act

1. Pursuant to the Regulatory Flexibility Act (RFA), *see* 5 U.S.C. § 603, the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and rules proposed in this *Further Notice of Proposed Rule Making and Order (Further Notice)*. Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and are to be filed by the deadlines for comments on the *Further Notice*, as described *supra* in section VI. The Secretary of the Commission shall cause a copy of this *Further Notice* to be sent to Chief counsel for Advocacy of the Small Business Administration (SBA), in accordance with 5 U.S.C. § 603(a).

**A. Reason for Action:**

2. This *Further Notice* requests further public comment on our proposals to maximize the use of spectrum allocated to Multiple Address Systems (MAS) in the Microwave Services. The *Notice of Proposed Rule Making (Notice)* in this proceeding offered proposals that included (1) converting licensing of MAS spectrum for "subscriber-based" services from site-based licensing to geographic area licensing, (2) simplifying and streamlining the MAS licensing process and rules, (3) increasing licensee flexibility to provide communications services that are responsive to dynamic market demands, and (4) employing competitive bidding procedures, or auctions, to resolve mutually exclusive applications for initial licenses or permits for MAS spectrum for which the principal use would involve, or reasonably likely involve, subscriber-based services. In this *Further Notice*, we seek comment on whether, and to what extent, the Balanced Budget Act's amendment of Section 309(j) of the Communications Act affects these proposals. Specifically, the Commission is now directed to use competitive bidding to resolve mutually exclusive applications, with an exemption for "public safety radio services." This *Further Notice* also extends the temporary suspension of the acceptance and processing of MAS applications to include all applications for new licenses, amendments, or modifications.

**B. Objectives:**

3. In attempting to maximize the use of MAS spectrum, we continue our efforts to establish a flexible regulatory framework for spectrum allocations that will, among other things, provide opportunities for the continued development of competitive new service offerings by allowing flexible use of spectrum, expedite market entry through modified licensing procedures, and promote technological innovation by eliminating unnecessary regulatory burdens.

**C. Legal Basis:**

4. The authority for this action is contained in Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j). *See also* Administrative Procedures Act, 5 U.S.C. § 553.

**D. Description and Estimate of Small Entities Affected:**

5. Pursuant to the Contract with America Advancement Act of 1996, Pub. L. No. 101-121, 110 Stat. 847 (1996) (CWAAA),<sup>99</sup> the Commission is required to estimate in its Final Regulatory Flexibility Analysis the number of small entities to which a rule will apply, provide a description of such entities, and assess the impact of the rule on such entities. The Regulatory Flexibility Act states that a "small business" is the equivalent of a "small business concern" under the Small Business Act unless the Commission has developed one or more definitions that are appropriate to its activities.<sup>100</sup> Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).<sup>101</sup> To assist the Commission in this analysis, commenters are requested to provide information regarding how many MAS entities, total, would be affected by the various proposals on which the Commission seeks comment in this *Further Notice*. In particular, we seek estimates of the number of affected entities that will be considered "small businesses." We ask commenters to note that we requested comment in the *Notice* regarding the establishment of a small business definition for MAS for the purpose of competitive bidding.

6. The proposals first announced in the *Notice* would affect MAS licensees and applicants for licenses. Such entities, in general, fall into two broad categories: (1) those using MAS spectrum for the offering of commercial services and (2) those using MAS spectrum to meet their internal communications needs, including for public safety radio services. It is possible that an entity could be categorized as both.

7. With respect to the first category, neither the Commission nor the SBA has developed a specific definition of small entities applicable to MAS commercial licensees. The applicable definition of small entity in this instance appears to be the definition under the SBA rules applicable to establishments engaged in radiotelephone communications. This definition provides that a small entity is any entity employing fewer than 1,500 persons. *See* 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812. The 1992 Census of Transportation, Communications and Utilities,

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<sup>99</sup> Title II of the CWAAA is the "Small Business Regulatory Fairness Act of 1996" (SBEFRA), codified at 5 U.S.C. § 601 *et seq.*

<sup>100</sup> *See* 5 U.S.C. § 601(3) (incorporating by reference the "small business concern" definition in 15 U.S.C. § 632).

<sup>101</sup> 15 U.S.C. § 632. *See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc.*, 176 B.R. 82,89 (N.D. Ga. 1994).



conducted by the Bureau of the Census, which is the most recent information available, shows that only 12 radiotelephone firms out of a total of 1,178 such firms operating during 1992 had 1,000 or more employees. Therefore, whether or not any or all of these 12 firms are MAS commercial service providers, nearly all MAS commercial service providers are small businesses under the SBA's definition. The Commission's licensing database indicates that, as of January 20, 1999, there were a total of 8,670 MAS station authorizations. Of these, 260 authorizations were associated with common carrier service.

8. Alternatively, under the SBA rules, the applicable definition of small entity for MAS licensees that provide commercial services may also be applicable to establishments primarily engaged in furnishing telegraph and other message communications. This definition provides that a small entity is an entity with annual receipts of \$5 million or less. 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) code 4822. 1992 Census data, which is the most recent information available, indicates that, of the 286 firms under this category, 247 had annual receipts of \$4.999 million or less.<sup>102</sup> We seek comment on whether the appropriate definition for such MAS licensees is SIC Code 4812, SIC code 4822, or both.

9. The Commission seeks comment on the number of small entities that currently provide commercial MAS subscription service, and the number of small entities that would anticipate filing applications to provide such service under the various proposals described in the *Further Notice* and the *Notice*. We seek comment on whether we should conclude, for purposes of the Final Regulatory Flexibility Analysis in this matter, that all MAS commercial communications service providers are small entities.

10. With respect to second category, which consists of entities that use, or seek to use, MAS spectrum for the meeting of their own internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. Because of the array of users, the Commission has not developed (nor would it be possible to develop) a definition of small entities specifically applicable to such MAS users. Nor is there a precise SBA definition. In this context we again seek comment on whether the appropriate definition of small entity under the SBA rules is that applicable to radiotelephone companies: any entity employing fewer than 1,500 persons. See 13 C.F.R. § 121.201, Standard Industrial Code (SIC) Code 4812. Again, alternatively, we seek comment on the appropriateness of defining such MAS licensees under SIC Code 4822, concerning establishments primarily engaged in furnishing telegraph or other message communications, or perhaps under both Codes 4812 and 4822. For the purpose of determining whether a licensee is a small business as defined by the SBA, each licensee would need to be evaluated within its own business area. The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations were for private radio service, and of these, 1,433 were for private mobile service.

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<sup>102</sup> 1992 Economic Census Industry and Enterprise Receipts Size Report, U.S. Bureau of the Census, U.S. Department of Commerce, Table 2D, SIC Code 4822 (industry data prepared by the Census Bureau under contract to the U.S. SBA Office of Advocacy).

11. We seek comment on the number of small entities that use MAS spectrum for their internal communications needs. Further, we seek comment on the number of small entities that are likely to apply for licenses, under the various proposals described in this *Further Notice* and the *Notice*, to obtain spectrum for their own internal communications needs. Because any entity engaged in a business or commercial activity is eligible to hold an MAS license, the our proposals could prospectively affect any small business in the United States interested in using MAS for its own communications needs. In other words, the universe of prospective or possible MAS licensees includes all U.S. small businesses.

12. The RFA also includes small governmental entities as part of the regulatory flexibility analysis.<sup>103</sup> The definition of a small governmental entity is one with populations of fewer than 50,000.<sup>104</sup> There are 85,006 governmental entities in the nation.<sup>105</sup> This number includes such entities as states, counties, cities, utility districts and school districts. There are no figures available on what portion of this number has populations of fewer than 50,000. However, this number includes 38,978 counties, cities and towns, and of those, 37,556, or 96 percent, have populations of fewer than 50,000.<sup>106</sup> The Census Bureau estimates that this ratio is approximately accurate for all government entities. Thus, of the 85,006 governmental entities, we estimate that 96 percent, or about 81,600, are small entities that may be affected by our rules.

13. Again, we have requested comment, in the initial *Notice*, regarding the establishment of a refined small business definition for MAS for the specific purpose of competitive bidding. Neither the *Notice* nor the *Further Notice* propose any specific definition, rather the *Notice* merely sought comment on this issue.

#### **E. Reporting, Recordkeeping, and Other Compliance Requirements:**

14. If we use competitive bidding to award certain, or all, MAS licenses, as proposed, and also establish a small business definition for competitive bidding purposes, then all small businesses that choose to participate in these services will be required to demonstrate that they meet the criteria set forth to qualify as small businesses.<sup>107</sup> Any small business applicant wishing to avail itself of small business provisions will need to make the general financial disclosures necessary to establish that the small business is in fact small.

15. Prior to auction, each small business applicant will be required to submit an FCC Form 175, OMB Clearance Number 3060-0600. The estimated time for completing an FCC Form 175 is 45

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<sup>103</sup> 5 U.S.C. § 601(5).

<sup>104</sup> *Id.*

<sup>105</sup> 1992 Census of Governments, U.S. Bureau of the Census, U.S. Department of Commerce.

<sup>106</sup> *Id.*

<sup>107</sup> See generally 47 C.F.R. Part 1, Subpart Q (competitive bidding procedures).

minutes. In addition to filing an FCC Form 175, each applicant must submit information regarding the ownership of the applicant, any joint venture arrangements or bidding consortia that the applicant has entered into, and financial information which demonstrates that a small business wishing to qualify for installment payments and bidding credits (if either or both are established) is a small business. Applicants that do not have audited financial statements available will be permitted to certify to the validity of their showings. While many small businesses have chosen to employ attorneys prior to filing an application to participate in an auction, the rules are proposed so that a small business working with the information in a bidder information package can file an application on its own. When an applicant wins a license, it will be required to submit an FCC Form 601 (Long-form Application for Authorization), which will require technical information regarding the applicant's proposals for providing service. This application, and any appropriate schedules and attachments, will require information provided by an engineer who will have knowledge of the system's design.

**F. Federal Rules That May Duplicate, Overlap, or Conflict with the Proposals:**

16. None.

**G. Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives:**

17. The *Further Notice* solicits comment on a variety of proposals that were first presented in the *Notice* in this proceeding. Any significant alternatives presented in the comments will be considered. As noted, we have request comment regarding the establishment of a small business definition for MAS. We also seek comment generally on the existence of small entities in MAS and how many total entities, existing and potential, would be affected by the proposed rules in both the *Further Notice* and the *Notice*. Finally, we request that each commenter identify whether it is a "small business" under either, or both, of the two SBA definitions described above -- either employing fewer than 1500 employees (for radiotelephone communications companies) or having annual receipts of \$5 million or less (for telegraph or other message communications companies).

18. The Commission expects that licensing some or all of the MAS bands by geographic area, as proposed, will assist small businesses. As described *supra*, such licensing makes expansion of operations easier, and this flexibility assists all licensees, including small business licensees. We also believe that the proposed EA geographic area service area is large enough to support the services contemplated while being small enough to be attractive to small business entities. The *Further Notice* also seeks comment on allocating portions of the MAS spectrum for public safety radio services. In addition, the proposed flexible approach to the build-out of MAS systems, described in the initial *Notice*, will assist licensees, including small business licensees, in designing and implementing their particular business plans, while the partitioning and disaggregation proposals will assist those small businesses that otherwise might be unable to acquire a "full" license as currently configured. Finally, we believe that the proposed spectrum auctions will assist small entities desiring to obtain MAS licenses. This approach gets licenses to those most likely to use them most effectively. We seek comment, therefore, on all proposals and alternatives described in the *Further Notice*, and the impact that such proposals and alternatives might have on small entities.